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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

K.D.,

Petitioner,

v.

THE SUPERIOR COURT OF
MONTEREY COUNTY,

Respondent,

MONTEREY COUNTY DEPARTMENT
OF SOCIAL & EMPLOYMENT
SERVICES,

Real Party in Interest.

No. H035546

(Monterey County
Super. Ct. No. J43198)

K.D., mother of the child at issue, has filed a petition for writ of mandate challenging the juvenile court's order terminating reunification services for her and setting the matter for a permanency planning hearing. (Welfare & Inst. Code, § 366.26, subd. (I).)¹ Mother contends that the court abused its discretion in not returning custody of the child to her following the 18-month review hearing. We find that substantial evidence supports the juvenile court's findings that return of the child would create a

¹ All further statutory references are to the Welfare and Institutions Code.

substantial risk of detriment and that mother's progress in alleviating the problems and conditions that led to removal of the child from mother's care were not sufficient.

However, as we further find that, on the record before us, the juvenile court could have extended the time period for services, if it was in the best interest of the child and there was a likelihood of success of further reunification efforts, we will grant the petition for writ of mandate and remand the matter for a hearing so that the court can make that determination.

BACKGROUND

On October 31, 2007, medical personnel found that the then 33-month-old child had bruises to his right lower abdominal and back areas and to his left lower abdominal area. An amended petition under section 300, subdivision (b) [failure to protect] was filed in the San Diego County Superior Court, alleging that mother had left the child inadequately supervised by the father despite knowing of the father's substance abuse problems and the child's special needs due to his asthma and congenital hydrocephalus. Father admitted using methamphetamine and heroin, the child needed daily treatment and monitoring, and there was a substantial risk the child would suffer serious physical harm or illness. The court ordered the child detained following a hearing on November 5, 2007, and granted mother supervised visitation.

The social worker's reports and addendums for the jurisdiction/disposition hearing recommended that the child be placed with mother and that visitation with the father be supervised. Mother was discharged from the Navy on December 27, 2007, and was collecting unemployment benefits. She completed a parenting class and was attending individual therapy. She attended all scheduled visits with the child and the visits were appropriate. All her drug test results were negative. She was living in the home of a woman who had served with her in the Navy and the social worker determined that the home met the minimum standards required by the San Diego County social services agency. Mother was proposing to move to Santa Cruz County where she had family who

could help her. The father, who was not married to mother, had an extensive criminal history going back to August 1999, and was incarcerated on a drug offense. A doctor who had examined the child in November 2007 reported that the bruises on the child could have been accidentally inflicted due to the child's large size.

The jurisdiction/disposition hearing was held on January 24, 2008. The court declared the child to be a dependent child of the court under section 300, subdivision (b), and returned the child to mother with family maintenance services and with supervised visits for the father. Mother was to comply with her case plan and to notify the San Diego County agency of any new mailing address. A review hearing was set for July 14, 2008.

On April 28, 2008, the San Diego County agency filed an ex parte application requesting a hearing on May 6, 2008. The social worker's report for the hearing recommended that the case be transferred to Monterey County. The alleged father was still incarcerated, but Mother and the child were residing with the paternal grandparents in Watsonville. Mother had not completed her case plan other than the parenting class, but a Monterey County social worker had visited the grandparents' home and reported that the home appeared to be safe for the child. On May 6, 2008, the San Diego County court ordered the matter transferred to Monterey County, and set a review hearing for July 14, 2008. At the July 14, 2008 hearing, the San Diego County court found that the transfer had not been accepted by Monterey County, but that Monterey County was willing to accept the transfer after San Diego County completed a status review for the family. The court set a review hearing for August 4, 2008.

The social worker's report and addendum for the review hearing recommended that the child be detained and that mother's visits with the child be supervised. On July 28, 2008, mother, the father, and the child were at the Felton residence of a person who was arrested for possession of drug paraphernalia and being under the influence of a controlled substance. The paternal grandmother reported on August 1, 2008, that she did

not know the whereabouts of the father, mother, and the child, but that she feared the father was using drugs again. The father was on probation for a drug offense, he was not allowed unsupervised visits with the child, and mother was not allowed to supervise contact between the child and the father. At the August 4, 2008 hearing, the court ordered the child detained and continued the review hearing to September 2, 2008.

The child was removed from mother's custody at the paternal grandparents' home by Monterey County child welfare services on August 16, 2008, and was transported to San Diego County. Mother remained in Monterey County. On August 20, 2008, a section 387 petition was filed in the San Diego County juvenile court, alleging that mother was no longer able to provide adequate care and supervision for the child. The child was ordered detained following a hearing on August 21, 2008, and the court set the matter for a hearing on the section 387 petition for September 2, 2008.

The social worker's report and addendum for the September 2, 2008 hearing recommended that mother receive six months of family reunification services and that the case be transferred to Monterey County. Mother had visited with the child in the San Diego foster home, but wanted the matter transferred as she still lived in Monterey County. Monterey County had agreed to accept the case, and reported that they would refer mother to services and ensure that she completed her case plan. At the hearing on September 2, 2008, the San Diego County court found the allegations in the section 387 petition to be true, and ordered that the minor remain out of mother's custody, that mother be provided family reunification services, and that the matter be transferred to Monterey County. On September 19, 2008, the Monterey County juvenile court accepted the transfer, ordered mother and the father to submit to drug testing, and set the matter for a review hearing on March 6, 2009.

The social worker's report for the March 6, 2009 hearing recommended that the child continue in out-of-home care, that family reunification services for mother continue, but that services for the father be terminated. Mother was receiving

unemployment benefits and had moved back to the residence of the paternal grandparents. She completed her parenting class and had begun individual therapy, but was not attending the Al-Anon meetings meant to deal with her co-dependency issues related to the father. She was visiting with the child twice a week and they had displayed “a deep bond and closeness unique to that of a child and his parent.” However, she accepted a telephone call from the father during one visit and had to be reminded that this was not appropriate. The father had been incarcerated on new and parole violation charges, but was released on February 3, 2009. The child was in a foster home in Santa Cruz County, and was still being treated for asthma and congenital hydrocephalus.

At the hearing on March 6, 2009, the Department of Social & Employment Services (the Department), mother, and the child submitted the matter on the social worker’s report. The court continued the child in his current placement, adopted the recommendations of the social worker, and set the matter for a review hearing on May 8, 2009.

The social worker’s report for the May 8, 2009 hearing recommended that services for mother be terminated and that a section 366.26 hearing be set. Mother had moved from the parental grandparents’ residence, but had not provided the Department with her current address or the contact information of her roommates, so the Department was not able to assess the appropriateness of the residence. She had regularly visited with the child and had attended all her individual therapy sessions, but had not regularly attended her Al-Anon meetings. On May 8, 2009, the court set the matter for a contested hearing. On June 17, 2009, the court continued the matter for a 12-month review in August 2009.

The social worker’s report for the 12-month review hearing recommended that services for mother be terminated and a section 366.26 hearing be set. Mother was taking college courses on the GI Bill, was receiving unemployment benefits, and was renting a room in a three-bedroom home. She was taking parenting classes, visiting with the child, attending Al-Anon meetings and individual therapy, and drug testing. However, she had

a positive drug test in April 2009, and she continued to repeatedly lie to the social worker about her circumstances; she only admitted the truth when confronted by the social worker's knowledge of it. The child was still being treated for congenital hydrocephalus, but no longer needed treatment for asthma. On August 12, 2009, the court granted mother's request for a contested hearing.

The contested hearing was held on October 5, 2009. Mother testified that she was no longer living at the three-bedroom house. She was living at a hotel and was looking for a new place to live. The court took the matter under submission, and on October 9, 2009, ordered continued services for mother.

The social worker's report and addendum for the 18-month review hearing recommended that services for mother be terminated and a section 366.26 hearing be set. Mother had dropped two of her three early childhood education classes in the fall, and she had not followed through with seeking housing through the Veteran's Assistance program, which she had been referred to nearly a year before. She had been homeless until March 1, 2010. As of that date she was being paid for providing in-home care for a woman and was staying in the woman's living room. She had not located a childcare provider for when she was in school. She had another positive drug test in November 2009, and had not provided proof of her regular attendance at her 12-step meetings. She attended her individual therapy sessions, but still showed anxious and depressive symptoms. The child, now five years old, was in individual therapy to manage his own anxiety and reactive attachment disorders. The child had reported that mother told him that they would be moving together to Missouri, which is where the maternal grandmother lives, but he wanted to live with the prospective adoptive family.

The contested 18-month review hearing was held on April 28, 2010. The Department and counsel for the child submitted the matter on the social worker's reports. The social worker testified that the woman who mother was providing in-home care for was willing to have the child live with mother in her home. Mother had no positive drug

tests in the prior six months. Her housing remained unstable as she had abruptly left what was considered stable housing in the past without having anywhere else to go. She had repeatedly stated that she wants to move to Missouri, so the social worker suspected that mother would do that if the child were returned to her care.

Mother testified that she was on the sixth step of her 12-step program, that she had taken three different early childhood education classes, and that she had regularly visited with the child. At the time of the hearing, her visits were supervised, one hour, once a week. If the child were to be returned to her custody, she would avoid dangerous situations, and not have him around anybody who she thinks may have something to do with alcohol or drugs. She has an oral agreement with the woman she works for, but there is no agreement as to how many hours she is needed as a caregiver. She was still in training and would remain so until the woman decided otherwise. She was being paid approximately \$200 per week and was provided free room and board, and she was no longer receiving unemployment benefits.

The court ruled in relevant part as follows: “This is the hearing . . . pursuant to Welfare & Institutions Code section 366.22. As provided in that section, the Court must return [the child] to the physical custody of the parents unless the Court finds by a preponderance of the evidence that the return of [the child] to his parent would create a substantial risk of detriment to the safety, protection [or] physical or emotional well-being of [the child]. [¶] This court case is a very difficult case. The Court does find that reasonable services were offered by the Department . . . to the mother. . . . [¶] It is noted that the hair follicle test mother [took after the last hearing] was positive. However, that is not a major significance in this case. [¶] What is of major significance is the Court does recognize that . . . mother[]does love [the child] very much, there’s no question about that. [¶] The Court also recognizes that [the child] is hydrocephalic, he is a special needs child. [¶] Hearing all the evidence and listening to the testimony this afternoon and reviewing the documents, the Court does find by a preponderance of evidence that

the return of [the child] to his mother would . . . create a substantial risk of detriment to his safety, protection or physical or emotional well-being [¶] Based on the evidence before the Court, including the evidence that [mother's] shelter and employment have changed frequently, and including the evidence that the recent shelter is only since March 1, 2010, and that the employer . . . states that [mother] is in training, the Court is particularly concerned about the . . . substantial risk of detriment by failing to provide for [the child's] safety considering his condition of hydrocephalus. [¶] . . . [¶] At this time the Court does find that mother's progress for alleviating or mitigating the causes necessitating placement of [the child] in foster care have not been sufficient [¶] The Court at this time does believe, based on the evidence, that it is appropriate to maintain the dependency of [the child], continue [the child] in out-of-home care, [and] terminate family reunification services to his mother” Accordingly, the court set a section 366.26 hearing for August 20, 2010.

DISCUSSION

Mother contends that the juvenile court should have ordered the return of the child to her. She argues that the court's decision was an abuse of discretion because she complied with all of the requirements of her reunification plan, there is nothing in the record that indicates that she could not care for the child's medical condition, and her “possibly becoming homeless is not particularly relevant to a finding regarding reunification.” The Department responds that the juvenile court's decision to terminate reunification services for mother and to set a section 366.26 hearing is supported by substantial evidence.

Section 366.22, subdivision (a) provides that, following an 18-month review hearing, the juvenile court “shall order the return of the child to the physical custody of his or her parent or legal guardian unless the court finds, by a preponderance of the evidence, that the return of the child to his or her parent or legal guardian would create a substantial risk of detriment to the safety, protection, or physical or emotional well-being

of the child.” An appellate court reviews the juvenile court’s decision following a section 366.22 hearing to determine whether there is substantial evidence in the record to support the decision. (*Constance K. v. Superior Court* (1998) 61 Cal.App.4th 689, 705.) We examine the evidence in the light most favorable to the Department, resolve all conflicts in the evidence in favor of the juvenile court’s order, and indulge in all reasonable inferences to support the findings of the court. (*In re Misako R.* (1991) 2 Cal.App.4th 538, 545; *In re Walter E.* (1992) 13 Cal.App.4th 125, 140.)

“In determining whether it would be detrimental to return the child at the 18-month review, the court must consider whether the parent participated regularly in any treatment program set forth by the plan, the ‘efforts or progress’ of the parent, and the ‘extent’ to which the parent ‘cooperated and availed himself or herself of services provided.’ (§ 366.26, subd. (a).)” (*Blanca P. v. Superior Court* (1996) 45 Cal.App.4th 1738, 1748; *Jennifer A. v. Superior Court* (2004) 117 Cal.App.4th 1322, 1341.) “The Agency has the burden of establishing detriment. [Citations.] . . . [T]he risk of detriment must be *substantial*, such that returning a child to parental custody represents some danger to the child’s physical or emotional well-being. [Citations.] (*In re Yvonne W.* (2008) 165 Cal.App.4th 1394, 1400.)

“Compliance with the reunification plan is certainly a pertinent consideration at the section 366.22 hearing; however, it is not the sole concern before the dependency court judge. [Citations.]” (*Constance K. v. Superior Court, supra*, 61 Cal.App.4th at p. 704; *Jennifer A., supra*, 117 Cal.App.4th at p. 1341.) Other pertinent considerations include “whether changing custody will be detrimental because severing a positive loving relationship with the foster family will cause serious, long-term emotional harm,” “instability in terms of management of a home,” “limited awareness by a parent of the emotional and physical needs of a child,” “failure of a minor to have lived with the natural parent for long periods of time,” “and the manner in which the parent has conducted himself or herself in relation to a minor in the past.” (*Constance K. v.*

Superior Court, supra, 61 Cal.App.4th at pp. 704-705.) “The court must also consider the efforts or progress the parent has made toward eliminating the conditions that led to the child’s out-of-home placement.” (*In re Yvonne W., supra*, 165 Cal.App.4th at p. 1400.)

In April 2010, section 361.5, subdivision (a)(4) (former § 361.5, subd. (a)(3)), gave the court limited authority to extend reunification services up to a maximum of 24 months “if it is shown, at the hearing held pursuant to subdivision (b) of Section 366.22, that the permanent plan for the child is that he or she will be returned and safely maintained in the home within the extended time period. The court shall extend the time period only if it finds that it is in the child’s best interest to have the time period extended and that there is a substantial probability that the child will be returned to the physical custody of his or her parent or guardian who is described in subdivision (b) of Section 366.22 within the extended time period, or that reasonable services have not been extended to the parent or guardian.” Nevertheless, the court had discretion upon a showing of good cause to continue the 18-month review hearing beyond the statutory time limit so that it could consider the likelihood of success of any further reunification efforts. (*In re Dino E.* (1992) 6 Cal.App.4th 1768, 1779.) In addition, “whether at the six-month, 12-month or 18-month review hearing, the juvenile court has the authority, in its discretion, to return a dependent child to the physical custody of his or her parent or guardian and either to terminate its jurisdiction or to retain dependency jurisdiction and order family maintenance services to ensure the safety and physical and emotional well-being of the child.” (*Bridget A. v. Superior Court* (2007) 148 Cal.App.4th 285, 316, fn. omitted.)

In the present case, the juvenile court found that return of the child would be detrimental due to mother’s lack of stable housing and employment and her failure to make progress in alleviating the problems that led to the removal of the child from her care. At the time of the 18-month review hearing on April 28, 2010, mother had

complied with the reunification plan in terms of participating in parenting classes, a 12-step program, and individual therapy, and she had been regularly visiting the child. However, mother's current employment and housing had not been obtained until March 1, 2010, and mother's employer still considered mother to be in training at the time of the hearing, some eight weeks later. Prior to that date her housing situation changed numerous times and she had been both unemployed and not a full-time student. On this record, the court could properly find that mother could not provide the child with stable housing and that mother could not maintain stable employment. In addition, the child had not lived with mother since he was last removed from her custody in August 2008, 20 months earlier, and her visits with the child remained supervised at the time of the hearing due to the way she had conducted herself during the early part of the reunification period. Thus, on this record, the court could properly find that mother had not made sufficient progress in alleviating the problems and concerns that prompted the removal of the child from mother's custody. We find that substantial evidence supports the juvenile court's findings that return of the child would create a substantial risk of detriment and that mother's progress in alleviating the problems and conditions that led to removal of the child from her care were not sufficient.

Mother argues that "making a determination that is based upon poverty or the lack of housing is against the weight of authority," citing *In re G.S.R.* (2008) 159 Cal.App.4th 1202, *In re P.C.* (2008) 165 Cal.App.4th 98, and *In re Yvonne W.*, *supra*, 165 Cal.App.4th 1394. We find these cases distinguishable from the case before us. The father in *G.S.R.*, unlike mother here, was a nonoffending, noncustodial parent who had never been found to be unfit. (*In re G.S.R.*, *supra*, 159 Cal.App.4th at pp. 1211.) The parental rights of the mother in *P.C.* were erroneously terminated due to the mother's inability to obtain housing acceptable to the social services agency, because the social services agency had failed to do its part in helping the mother find suitable low-income housing. (*In re P.C.*, *supra*, 165 Cal.App.4th at pp. 103, 106.) In the case before us,

mother's inability to find and keep appropriate housing was not inextricably tied to poverty or to the failure of the Department to provide services. Mother was receiving unemployment and G.I. Bill benefits during most of the reunification period, and mother refused or declined the social worker's numerous attempts to help her obtain housing through Veteran's Assistance. In *Yvonne W.*, the uncontroverted evidence was that the mother had stable and appropriate housing at a long-term shelter, yet the juvenile court found detriment based on the mother's housing situation. The appellate court held that this was error. (*In re Yvonne W.*, *supra*, 165 Cal.App.4th at p. 1401.) In the case before us, although mother's living arrangement at the time of the 18-month review hearing could be considered appropriate, it certainly was not stable. Mother was living with the woman for whom she was in training to be an in-home caregiver. She had been there some eight weeks but she had no written contract, so her living arrangements could be terminated by the woman at any time. And, mother had previously abruptly moved from what had been considered a stable living arrangement even though she had nowhere else to go. The juvenile court properly considered mother's living arrangements in this case when making its determination of detriment.

Nevertheless, the record before this court indicates that mother was the child's primary, if not sole, caregiver during the first 33-months of the child's life and again for over seven months in 2008; mother was able to take care of the child's special needs; mother completed a parenting class, attended Al-Anon meetings and individual therapy, and had tested drug-free for six months; and mother visited regularly with the child and they had displayed a deep bond and closeness unique to that of parent and child. In addition, at the time of the 18-month review hearing, mother was working as an in-home caregiver, she was provided room and board in addition to wages, and her employer had agreed to allow the child to live with mother. The juvenile court found that this was "a very difficult case" and it appears to this court that the limited length of time of mother's current housing and employment caused the juvenile court to find at the hearing that

return of the child to mother would be detrimental. On this record, rather than setting a section 366.26 hearing, the juvenile court could have continued the 18-month review hearing (*In re Dino E.*, *supra*, 6 Cal.App.4th at p. 1779), or set a 24-month review hearing and either extended reunification services for another six months to allow mother time to show that her housing and employment arrangements were stable and thus that there was a reasonable probability that the child could be returned to her care within the next six months (§ 361.5, subd. (a)(4)), or returned the child to mother with family maintenance services (*Bridget A.*, *supra*, 148 Cal.App.4th at p. 316). Accordingly, we will grant the petition for writ of mandate, and remand the matter to the juvenile court to allow the court to conduct a further review hearing to determine whether it was in the best interests of the child to continue services for six additional months so that the court could consider the likelihood of success of any further reunification efforts.

DISPOSITION

The petition for writ of mandate is granted. Let a peremptory writ of mandate issue directing respondent superior court to vacate that portion of its order of April 28, 2010, terminating services for petitioner K.D. and setting a Welfare and Institutions Code section 366.26 hearing, and to issue a new order setting a hearing to determine whether it was in the best interests of the child to continue services for six additional months so that the court could consider the likelihood of success of any further reunification efforts.

BAMATTRE-MANOUKIAN, ACTING P.J.

WE CONCUR:

MIHARA, J.

MCADAMS, J.